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LOGICAL OPERATIONS CONSORTIUM SDN BHD v. ABDUL RAHIM ABDUL RAZAK & ANOR AND ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
MARY LIM JCA
SURAYA OTHMAN J
[CIVIL APPEALS NO: W-02(W)-2145-11-2016 & W-02-1977-10-2016]
6 SEPTEMBER 2017

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CONTRACT: *Claim for services rendered – Consultancy services – Whether requisite elements to justify claim under s. 71 of Contracts Act 1950 established – Whether evidence adduced to substantiate claim – Whether services intended to be gratuitous – Whether claim premised on quantum meruit sustainable*

D

CONTRACT: *Damages – Loss of profit – Claim premised on representation – Whether representation gave rise to legitimate claim for loss of profit – Claim based on projections – Whether projections admissible to support claim – Whether party claiming to have relied on representation was same party that lost potential profits – Whether mere representation that do not induce parties to enter into contract actionable – Whether burden of proof satisfied*

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There were two consolidated appeals herein: (i) appeal W-02(W)-2145-11-2016 by Logical Operations Consortium Sdn Bhd, the appellant ('plaintiff') against part of the decision of the High Court dismissing the plaintiff's claim against Abdul Rahim bin Abdul Razak, the first respondent ('the first defendant') and Silverlake System Sdn Bhd, the second respondent ('the second defendant') for RM16 million, being loss of profits and dismissing the plaintiff's claim against the first defendant for RM2,005,687.50 being business procurement/consultancy services rendered ('consultancy services'); and (ii) appeal W-02-1977-10-2016 by the second defendant against the decision of the High Court holding the second defendant liable to the plaintiff for RM2,005,687.50 for the consultancy services rendered. The plaintiff's shareholders and directors were Dr Singanallur Ventakaraman Narayanan ('Narayanan') and his wife. In 2006, Bank Kerjasama Rakyat Malaysia Bhd ('Bank Rakyat') was looking to award a project which involved the outsourcing of the operation of an Islamic credit card ('the project'). The first defendant, then an employee of Bank Islam, introduced Narayanan and one Udhaya Kumar ('Uday'), a freelance consultant engaged by the plaintiff, to the second defendant. All the parties then collaborated in order to secure the project by Bank Rakyat to the second defendant. For the purposes of the collaboration, Narayanan used his company, the plaintiff, to provide services for the procurement of the project. The understanding between the parties was that if the second defendant was successful in securing the project from Bank Rakyat, the second defendant would be the main contractor and Narayanan would set up a corporate

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vehicle which would be the sub-contractor to the project. Towards this end, IICS Operations Sdn Bhd ('IICSO') was incorporated and the directors were Narayanan, his wife, Uday and Rajendran. The plaintiff, through Uday and Rajendran, worked with the first and second defendants to prepare a proposal to bid for the project and the second defendant was eventually awarded the project by Bank Rakyat. The second defendant then commenced negotiations with IICSO (through Narayanan and Uday) on the terms of the sub-contract. Negotiations broke down and no sub-contract was entered into between the second defendant and IICSO. Despite this, the second defendant entered into a contract with IICSO for pre-operations consultancy services in respect of the project for the sum of RM990,000 which was fully paid by the second defendant to IICSO. Subsequently, the plaintiff commenced an action against the defendants at the High Court claiming for the sum of RM2,005,687.50 for consultancy services rendered by the plaintiff to the defendants to secure the project and a sum of RM16 million being loss of profits against both the defendants. The High Court dismissed the plaintiff's claim for loss of profits against the defendants and dismissed the plaintiff's claim for consultancy services against the first defendant. However, the plaintiff's claim for consultancy services against the second defendant was allowed by the High Court.

Held (dismissing plaintiff's appeal in appeal W-02(W)-2145-11-2016; allowing second defendant's appeal in appeal W-02-1977-10-2016)
Per Suraya Othman J delivering the judgment of the court:

(1) In the statement of claim, the plaintiff did not plead that the consultancy services were in fact done for the first defendant. There was also no evidence led by the plaintiff to show that the first defendant benefited from the project. Uday's testimony was that the first defendant was not paid by them for the assistance rendered. In the circumstances, the first defendant was not liable to the plaintiff for RM2,005,687.50 for consultancy services rendered. Hence, the trial judge's decision to dismiss the plaintiff's claim against the first defendant did not merit appellate intervention and was thus affirmed. (para 19)

(2) The plaintiff had failed to establish the requisite elements to justify its claim on the basis of either s. 71 of the Contracts Act 1950 and/or *quantum meruit*. The representations were specifically alleged to have been made by the first defendant as an individual, whilst only general assertions of representations were made against the second defendant without going into particulars as to who made the alleged representations on behalf of the second defendant. The plaintiff also did not plead that it was appointed by the second defendant to undertake the consultancy services and there was also no evidence at trial to support it. The evidence showed that the consultancy services rendered by the plaintiff were for its own benefit and were intended to be gratuitous. As

such s. 71 of the Contracts Act 1950 was not applicable. The plaintiff also had failed to discharge its burden to prove the determination of a reasonable sum which was crucial in order to sustain a claim premised on *quantum meruit*. (paras 21-23, 29 & 30)

(3) The plaintiff's claim for loss of profits was premised on certain representations alleged to have been made by the defendants. The claim was based on projections, on a single sheet document known as 'profit forecasts for IICSO', prepared by the plaintiff or IICSO. The projections were entirely dependent upon assumptions and parameters determined by the plaintiff without any evidence in support. The document, having been objected to by the defendants, was ruled inadmissible at the trial. Hence, without any supporting evidence to substantiate its claim, the plaintiff's claim fell flat. (paras 35, 37 & 38)

(4) The plaintiff's assertions on the representations made were directed at the first defendant and not the second defendant and it remained unclear as to what were the specific representations made by the second defendant to the plaintiff. The party who claimed to have relied on the representations made by the defendants was not the same party that had purportedly lost potential profits under the arrangement, which would be IICSO. Hence, it was IICSO, and not the plaintiff, who would have the right of action to a claim for profits. Further, it is trite law that mere representations that do not induce parties to enter into a contract are not ordinarily actionable. On the facts herein, there was no agreement between parties as to the terms of the sub-contract. (paras 41-45)

Bahasa Malaysia *Headnotes*

Terdapat dua rayuan yang digabungkan di sini: (i) rayuan W-02(W)-2145-11-2016 oleh Logical Operations Consortium Sdn Bhd, perayu ('plaintif') terhadap sebahagian keputusan Mahkamah Tinggi menolak tuntutan plaintif terhadap Abdul Rahim bin Abdul Razak, responden pertama ('defendan pertama') bagi RM16 juta, untuk kerugian untung dan menolak tuntutan plaintif terhadap defendan pertama bagi RM2,005,687.50 bagi mendapatkan perniagaan/perkhidmatan perunding yang diberikan ('perkhidmatan perunding'); dan (ii) rayuan W-02-1977-10-2016 oleh defendan kedua terhadap keputusan Mahkamah Tinggi memutuskan defendan kedua bertanggungan pada plaintif bagi jumlah RM2,005,687.50 untuk perkhidmatan perunding yang diberikan. Pemegang-pemegang saham dan pengarah-pengarah plaintif adalah Dr Singanallur Venkataraman Narayanan ('Narayanan') dan isterinya. Pada 2006, Bank Kerjasama Rakyat Malaysia Bhd ('Bank Rakyat') hendak mengawardkan satu projek melibatkan penyumberluaran operasi kad kredit berunsur Islam. Defendan pertama, yang pada ketika itu pekerja Bank Islam, memperkenalkan Narayanan dan Udhaya Kumar ('Uday'), seorang perunding bebas yang dilantik plaintif, kepada defendan kedua. Kesemua pihak kemudiannya bekerjasama untuk

mendapatkan projek oleh Bank Rakyat untuk defendan kedua. Bagi tujuan kerjasama tersebut, Narayanan menggunakan syarikatnya, plaintif, untuk memberikan perkhidmatan untuk mendapatkan projek itu. Persefahaman antara pihak-pihak adalah bahawa jika defendan kedua berjaya mendapatkan projek tersebut dari Bank Rakyat, defendan kedua akan menjadi kontraktor utama dan Narayanan akan membentuk sebuah syarikat yang akan menjadi sub-kontraktor projek. Bagi tujuan itu, IICS Operations Sdn Bhd ('IICSO') ditubuhkan dan pengarah-pengarahnya ialah Narayanan, isterinya, Uday dan Rajendran. Plaintif, melalui Uday dan Rajendran, bekerja dengan defendan-defendan pertama dan kedua untuk menyediakan cadangan untuk membida projek tersebut dan defendan kedua akhirnya diawardkan projek tersebut oleh Bank Rakyat. Defendan kedua kemudian memulakan rundingan dengan IICSO (melalui Narayanan dan Uday) bagi terma-terma sub-kontrak. Rundingan tersebut gagal dan sub-kontrak tidak dimeterai antara defendan kedua dan IICSO. Walau bagaimanapun, defendan kedua memasuki kontrak dengan IICSO untuk perkhidmatan perunding pra-operasi berkaitan dengan projek tersebut bagi jumlah RM990,000 yang dibayar sepenuhnya oleh defendan kedua kepada IICSO. Kemudian, plaintif memulakan tindakan terhadap defendan-defendan di Mahkamah Tinggi menuntut jumlah RM2,005,687.50 bagi perkhidmatan rundingan yang diberikan oleh plaintif kepada defendan-defendan untuk mendapatkan projek tersebut dan jumlah RM16 juta bagi kehilangan keuntungan terhadap kedua-dua defendan. Mahkamah Tinggi menolak tuntutan plaintif bagi kehilangan keuntungan terhadap defendan-defendan dan menolak tuntutan plaintif bagi perkhidmatan rundingan terhadap defendan pertama. Walau bagaimanapun, tuntutan plaintif bagi perkhidmatan perunding terhadap defendan kedua dibenarkan oleh Mahkamah Tinggi.

Diputuskan (menolak rayuan plaintif dalam rayuan W-02(W)-2145-11-2016; membenarkan rayuan defendan kedua dalam rayuan W-02-1977-10-2016)

Oleh Suraya Othman H menyampaikan penghakiman mahkamah:

(1) Dalam pernyataan tuntutan, plaintif tidak memplidkan bahawa perkhidmatan rundingan sebenarnya dibuat untuk defendan pertama. Juga, tiada keterangan dikemukakan oleh plaintif untuk menunjukkan bahawa defendan pertama mendapat faedah daripada projek tersebut. Uday memberikan keterangan bahawa defendan pertama tidak dibayar oleh mereka untuk bantuan yang diberikan. Dalam keadaan itu, defendan pertama tidak bertanggungan terhadap plaintif untuk RM2,005,687.50 bagi perkhidmatan rundingan yang diberikan. Oleh itu, keputusan hakim bicara menolak tuntutan plaintif terhadap defendan pertama tidak mewajarkan campur tangan rayuan dan dengan itu, disahkan.

(2) Plaintif gagal membuktikan elemen-elemen penting untuk menjustifikasi tuntutannya atas asas sama ada s. 71 Akta Kontrak 1950 dan/atau *quantum meruit*. Representasi secara khusus didakwa dibuat oleh

defendan pertama sebagai seorang individu, manakala hanya pernyataan umum representasi dibuat terhadap defendan kedua tanpa menyatakan butiran mengenai siapa yang membuat representasi yang didakwa bagi pihak defendan kedua. Plaintif juga tidak memplidkan bahawa ia dilantik oleh defendan kedua untuk memberikan perkhidmatan perundingan dan juga tiada keterangan sokongan dalam perbicaraan. Keterangan menunjukkan bahawa perkhidmatan rundingan yang diberi plaintif adalah untuk kepentingannya sendiri dan diniatkan sebagai percuma. Oleh itu, s. 71 Akta Kontrak 1950 tidak beraplikasi. Plaintif juga gagal melepaskan beban untuk membuktikan pertimbangan jumlah yang munasabah yang penting untuk mengekalkan tuntutan berasaskan *quantum meruit*.

(3) Tuntutan plaintif untuk kehilangan keuntungan berdasarkan representasi tertentu didakwa dibuat oleh defendan-defendan. Tuntutan tersebut berdasarkan unjuran, pada dokumen satu helaian yang dikenali sebagai 'profit forecast for IICSO', yang disediakan oleh plaintif atau IICSO. Unjuran tersebut bergantung sepenuhnya pada andaian dan had yang ditentukan oleh plaintif tanpa apa-apa keterangan sokongan. Dokumen tersebut, yang dibantah oleh defendan-defendan, diperintahkan tidak boleh diterima dalam perbicaraan. Oleh itu, tanpa keterangan sokongan untuk menyokong tuntutannya, tuntutan plaintif gagal.

(4) Hujahan plaintif bagi representasi yang dibuat diarahkan pada defendan pertama dan bukan defendan kedua dan masih tidak jelas apakah representasi spesifik yang dibuat oleh defendan kedua kepada plaintif. Pihak yang menuntut telah menyandar atas representasi defendan-defendan bukan pihak yang sama yang kononnya gagal mendapatkan keuntungan yang mungkin didapati bawah pengaturan tersebut, yang sepatutnya ialah IICSO. Oleh itu, IICSO, dan bukan plaintif, yang akan mempunyai hak bertindak untuk menuntut keuntungan. Selanjutnya, adalah undang-undang matan bahawa biasanya, tindakan tidak boleh diambil atas representasi semata-mata yang tidak mendorong pihak-pihak memasuki kontrak. Atas fakta di sini, tiada perjanjian antara pihak-pihak mengenai terma-terma sub-kontrak.

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Benedetti and Another v. Sawiris and Others [2014] AC 938 ***(refd)***

Bonham Carter v. Hyde Park Hotel (1948) 64 TLR 177 ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 1 LNS 161 PC ***(refd)***

Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd and Anor [2010] 9 CLJ 785 FC ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 71

(Civil Appeal No: W-02(W)-2145-11-2016)
For the appellant - Elaine Siaw; M/s Raja, Darryl & Loh
For the respondent - Tieh Siaw Siong; M/s SS Tieh

(Civil Appeal No: W-02-1977-10-2016)
For the appellant - Tieh Siaw Siong; M/s SS Tieh
For the 1st respondent - Siti Nurani Md Zahidi; M/s Rashid Zulkifli
For the 2nd respondent - Elaine Siaw; M/s Raja, Darryl & Loh

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: W-02-1977-10-2016 (overruled in part).]

Reported by S Barathi

JUDGMENT

Suraya Othman J:

Introduction

[1] Before this honourable court, there are two appeals consolidated pursuant to an order dated 9 January 2017:

(a) W-02(W)-2145-11-2016

(b) W-02-1977-10-2016

[2] For ease of reference, parties will be referred to herein as they were during the proceedings at the High Court. The plaintiff is Logical Operations Consortium Sdn Bhd, the first defendant Abdul Rahim bin Abdul Razak and the second defendant Silverlake System Sdn Bhd.

[3] Appeal W-02(W)-2145-11-2016 is the appeal by the plaintiff against part of the decision of the High Court dated 30 September 2016 in dismissing the plaintiff's claim against the first and second defendants for RM16 million, being loss of profits and dismissing the plaintiff's claim against the first defendant for RM2,005,687.50 being business procurement/consultancy services rendered ("consultancy services").

[4] Appeal W-02-1977-10-2016 is the appeal by the second defendant against the decision of the High Court dated 30 September 2016 in holding the second defendant liable to the plaintiff for RM2,005,687.50 for consultancy services rendered.

[5] We heard the appeal on 15 May 2017 and dismissed the plaintiff's appeal and allowed the second defendant's appeal. We now give our reasons for our decision.

A **The Parties**

[6] The plaintiff is a private limited company incorporated in Malaysia. The plaintiff's shareholders and directors are Dr Singanallur Ventakaraman Narayanan ("Narayanan") and his wife, Uma @ Sigappi a/p Singaram. The first defendant was at the material time an employee of Bank Islam and the
B second defendant is a private limited company incorporated in Malaysia.

Background Facts

[7] In 2006, Bank Kerjasama Rakyat Malaysia Berhad ("Bank Rakyat") was looking to award a project which involved the outsourcing of the
C operation of an Islamic credit card ("the project").

[8] The first defendant, then an employee of Bank Islam introduced Narayanan and one Udhaya Kumar a/l Naranam @ Narayanan ("Uday") to the second defendant. All the parties then collaborated in order to secure the project by Bank Rakyat to the second defendant.

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[9] For the purposes of this said collaboration, Narayanan used his company, Logical Operations Consortium Sdn Bhd (plaintiff), to provide services for the procurement of the project. It is to be noted that Narayanan is both a shareholder and managing director of the plaintiff. Uday on the other hand was a freelance consultant engaged by the plaintiff.
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[10] The understanding between the parties had been that if the second defendant was successful in securing the project from Bank Rakyat, then the second defendant would be the main contractor and Narayanan will set up a corporate vehicle which would be the sub-contractor to the project.

F **[11]** Towards this end, IICS Operations Sdn Bhd ("IICSO") was incorporated on 20 August 2007 with Narayanan, one Md Hidzir bin Adam and one Liana Sari binti Hafizar as shareholders. The directors of IICSO were Narayanan, his wife Uma, Uday and Rajendran a/l K K Raman (both appointed on 14 October 2008).

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[12] The plaintiff, through Uday and Rajendran, worked with the first and second defendants to prepare a proposal to bid for the project. The second defendant then submitted the proposal to Bank Rakyat and was eventually awarded the project by Bank Rakyat on 21 November 2007.

H **[13]** The second defendant then commenced negotiations with IICSO (through Narayanan and Uday) on the terms of the sub-contract. Negotiations broke down and no sub-contract was entered into between the second defendant and IICSO. Despite this, on 20 May 2008, the second defendant entered into a contract with IICSO for pre-operations consultancy services in respect of the project for the sum of RM990,000 which sum was fully paid
I by the second defendant to IICSO.

[14] On 1 June 2009, the plaintiff issued a demand notice against the defendants for the sum of RM2,005,687.50 being the plaintiff's fee for the consultancy services rendered by the plaintiff to the defendants to secure the project.

[15] The plaintiff commenced an action against the defendants at the High Court in Malacca. The plaintiff claimed for the sum of RM2,005,687.50 for consultancy services and a sum of RM16 million being loss of profits against both the defendants.

[16] The High Court dismissed the plaintiff's claim for loss of profits against both the defendants and dismissed the plaintiff's claim for consultancy services against the first defendant. However, the plaintiff's claim for consultancy services against the second defendant was allowed by the High Court.

Our Decision

Claim For Consultancy Services

[17] At the outset, the claim for consultancy services of RM2,005,687.50 by the plaintiff against the defendants was made under s. 71 of the Contracts Act 1950 and/or on the basis of *quantum meruit*. The trial judge dismissed the plaintiff's claim against the first defendant but allowed the plaintiff's claim against the second defendant.

[18] The trial judge found that the first defendant's role was that of an "introducer" of the "attractive opportunity" for the second defendant to succeed in the bid for the project with the collaboration of the plaintiff, the first and the second defendants. Although the trial judge did not make a specific finding that the first defendant personally benefited from the project, the trial judge found the first defendant not personally liable to the plaintiff under s. 71.

[19] Further, it must be noted that the plaintiff did not plead in the statement of claim that the consultancy services were in fact done for the first defendant and there was also no evidence led by the plaintiff to show that the first defendant benefited from the project. In fact, Uday testified in cross-examination that the first defendant was not paid by them for the assistance rendered. In such circumstances, we are of the view, that the learned trial judge has not erred in her decision that the first defendant is not liable to the plaintiff for RM2,005,687.50 for consultancy services rendered. Her decision to dismiss the plaintiff's claim against the first defendant, therefore, does not merit appellate intervention and is thus affirmed.

[20] As for the second defendant, the following findings made by the learned trial judge are reproduced below. The trial judge found that:

(a) no representations were made by the second defendant to the plaintiff. In fact, representations were only made by the first defendant;

(b) the second defendant did not appoint the plaintiff to provide consultancy services;

(c) the works that were carried out by the plaintiff was in collaboration with the second defendant;

(d) no fees were requested by the plaintiff from the second defendant;

(e) there was no agreed rate of payment for the plaintiff.

[21] We are of the view that armed with these findings of facts made above, the claim against the second defendant should have been dismissed by the learned trial judge simply because the plaintiff had failed to establish the requisite elements to justify for its claim to be allowed on the basis of either s. 71 of the Contracts Act 1950 and/or *quantum meruit*. Our reasons are as follows.

[22] First, in the statement of claim, representations were specifically alleged to have been made by the first defendant as an individual whilst only general assertions of representations were made against the second defendant without going into particulars as to who made the alleged representations on behalf of the second defendant. At trial, Narayanan admitted that it was the first defendant who made the alleged representations and he was unsure whether the second defendant's representative who attended the meeting made any representations.

[23] Second, the plaintiff did not plead that it was appointed by the second defendant to undertake the consultancy services and there was no evidence at trial to support it.

[24] Third, when the consultancy services were rendered by the plaintiff through Narayanan and Uday, they were rendered for the plaintiff's own benefit in that Narayanan and his colleagues through their collaboration with the second defendant will be rewarded with the appointment of IICSO as a sub-contractor to the second defendant under the project.

[25] Fourth, the consultancy services were intended to be gratuitous in that the plaintiff did not intend to charge the second defendant for payment for services rendered. Instead, it is an undisputed and unchallenged fact that the reward for the plaintiff would translate into a different form and not into the form of monetary compensation or payment from the second defendant. As stated earlier, the reward will be through the award of a sub-contract to IICSO. In other words, IICSO will be a sub-contractor to the main contractor, the second defendant, on terms to be agreed upon, should the project be awarded to the second defendant. The document in the form of emails between the parties supports this since no reference was made in them to any fee or payment of consultancy services.

[26] Let us look at s. 71 of the Contracts Act 1950. Section 71 provides as follows: A

> Obligation of person enjoying benefit of non-gratuitous act
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> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. B

[27] In support of a claim under s. 71, the Privy Council in *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; [1967] 2 MLJ 118 held that four conditions must be satisfied to establish a claim under s. 71: C

> It has been common ground before their Lordship that four conditions must be satisfied to establish a claim under section 71.
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> The doing of the act or delivery of the thing referred to in the section:
>
> (1) must be lawful; D
>
> (2) must be done for another person;
>
> (3) **must not be intended to be done gratuitously;**
>
> (4) must be such that the other person enjoys the benefit of the act or delivery. E
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> In Their Lordship's judgment these matters must be answered at the time that the act is done or delivered and this, their Lordships think, is of fundamental importance. (emphasis added)

[28] The Court of Appeal in *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002, was of the view that: F

> Section 71 is the statutory embodiment of the common law principle of *quantum meruit*, which provide for just compensation as the measure of work done as opposed to contractual damages.

[29] In our instant case, the evidence led and the findings made by the learned trial judge show that the consultancy services rendered by the plaintiff were not done for another and were intended to be gratuitous. The services were undertaken by the plaintiff for its own benefit. As such s. 71 is not applicable. G

[30] Fifth, the plaintiff is claiming RM2,005,687.50 for consultancy services rendered. The plaintiff failed in discharging its burden to prove the determination of a reasonable sum which is crucial in order to sustain a claim premised on *quantum meruit*. In this context, no evidence at all was led by the plaintiff to establish: H

(a) the market value of comparable or similar works; I

(b) the reasonable or objective value of the services rendered by the plaintiff; or

(c) at the very least, the usual sum imposed by the plaintiff on its other clients for similar services rendered.

[31] In *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugur Bhd* [2009] 1 CLJ 786; [2009] 2 MLJ 546, in deciding whether the appellant was entitled to recover on *quantum meruit* for work done, the Court of Appeal held that the amount representing the work done is usually calculated by reference to the market price of the value of services.

> [44] It must be borne in mind that when the appellant contractor is seeking a *quantum meruit* it is seeking not a precise sum of money nor a sum representing the general damages incurred by the appellant contractor as a result of some wrongful act on the part of the respondent employer. Rather the appellant contractor is seeking a sum that will provide the appellant contractor with the value of what the appellant contractor has done for the respondent employer. **And this is usually calculated by reference to the market price of value of the services**. (emphasis added)

[32] In the Supreme Court case of *Benedetti and Another v. Sawiris and Others* [2014] AC, Lord Reid JSC held that to determine the amount of work done, the objective value of the services at the time of receipt, that is to say the price which a reasonable person in the defendant's position would have paid for the services has to be taken into consideration by the court and that this exercise by the court may involve the exercise of judgment, but does not involve the exercise of discretion.

> In dealing with the evidence, the trial judge starting point was that a "claim to a *quantum meruit* gives the court a wide discretion to award what it considers to be a fair and reasonable sum for the services ....
>
> That is not the correct approach. As I have explained, *the court has to determine the objective value of the services at the time of receipt, that is to say the price which a reasonable person in the Defendant's position would have paid for the services. That exercise may involve the exercise of judgment, but it does not involve the exercise of discretion*." (emphasis added)

[33] In our present case, no evidence was led as to what would be a reasonable fee for the consultancy services rendered. The only justification forwarded by the plaintiff was a single sheet of paper containing tables drawn up by the plaintiff stating the amount of time spent with hourly rates of RM625. This document, however, in our view suffers from the defect that it shows no proof of time entries and hours spent on work allegedly done and contains no justification to support the unilateral hourly rate of RM625 or any rate for that matter at all. This was entirely a self-serving document offering no independent corroborative value, or be evidence of any credible value.

[34] In that light, the learned trial judge had rejected the said evidence as being inadmissible. As such, there was really nothing left at all to substantiate the plaintiff's claim. Therefore, we are unanimous in our view, that having rejected that piece of evidence, the learned trial judge erred when she went

on to find the second defendant liable to compensate the plaintiff for the consultancy services rendered and in allowing the plaintiff's claim against the second defendant. We therefore allow the appeal by the second defendant and set aside the decision of the High Court in that regard.

Claim For RM16 Million For Loss Of Profits

[35] With regards to this appeal, it is clear from a perusal of the pleadings and the evidence adduced during trial at the High Court that the plaintiff's claim where loss of profits is concerned is premised on certain representations alleged to have been made by the defendants. It is the defendants' contention that they never made any representations to the plaintiff that could possibly give rise to a legitimate claim for loss of profits.

[36] The High Court held at p. 65 of its judgment that the loss of profit claim is based merely on projections which in any event was not supported by any evidence on which reliance can be placed upon for the purpose of supporting the claim on a legal basis.

[37] Without any supporting evidence to substantiate its claim, the plaintiff's claim falls flat and the learned trial judge was correct in ruling that the plaintiff's claim was not substantiated and thus unproven. This, in our considered view, is a correct finding made by the learned trial judge as the burden of proof lies with the plaintiff to prove its claim. The plaintiff cannot simply as decided by *Bonham Carter v. Hyde Park Hotel* (1948) 64 TLR 177 p. 178 "throw them at the head of the court" to satisfy its burden of proving the amount claimed.

[38] What is even more significant is the fact that the plaintiff's projections were based on a single sheet document known as "profit forecasts for IICSO" prepared by the plaintiff or IICSO. The projections were entirely dependent upon assumptions and parameters determined by the plaintiff without any evidence in support. The document was objected to by the defendants and the objection was upheld by the learned trial judge who eventually ruled the said document inadmissible during the trial proceedings.

Representations By Defendants

[39] We now turn to consider the issue of the representations that was allegedly made by the second defendant to the plaintiff.

[40] The High Court held at pp. 58 to 60 of its judgment that at all material times, representations were made by the first defendant and not the second defendant.

[41] This finding is not without basis as the plaintiff's assertions on the representations made were directed at the first defendant and not the second defendant.

[42] It remains unclear even to us what are the specific representations made by the second defendant to the plaintiff. Even during the trial, Narayanan had testified that it was the first defendant who made all the alleged representations and he was unsure as to the representations made by the second defendant.

[43] We pause here to note that having perused the evidence adduced and the judgment of the learned trial judge, the party who claimed to have relied on the representations made by the defendants (the plaintiff) was not the same party that had purportedly lost potential profits under the arrangement which would be IICSO. In other words, it would be IICSO and not the plaintiff who would have the right of action to a claim for profits.

[44] At the same time, it is trite law that mere representations that do not induce parties to enter into a contract are not ordinarily actionable. Reference in this context is made to the Court of Appeal's case of *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231; [1999] 2 MLJ 500.

[45] Having said that, we are also minded to refer to the important fact that there was no agreement between parties as to the terms of the sub-contract. This was highlighted by the learned trial judge at pp. 65 to 66 of her grounds of judgments.

[46] This important fact must be viewed in light of the evidence led by the plaintiff through Narayanan who had admitted:

(a) there was no agreement between parties on charges and the payment schedule for the proposed sub-contract;

(b) no agreement exists between the parties on the terms of the proposed sub-contract;

(c) IICSO were not ready to sign the draft sub-contract agreement that existed as of April 2008;

(d) no agreement was ever signed between IICSO and the second defendant.

[47] Another important point to note is the evidence of Uday where he had admitted that:

(a) there was no agreement between the parties on the division of profits;

(b) there was no agreement between the parties on the financial terms of the proposed sub-contract;

(c) the plaintiff was aware that no agreement exists between parties as long as a contract is not signed between parties;

(d) both the plaintiff and the second defendant were aware that there was no contract between them and all works were done in good faith.

[48] As such, we find no reason to interfere with the findings made by the learned trial judge which were principally on findings of facts. It is trite law that findings of facts made by the trial judge are rarely reversed at the appellate level unless there is a serious error, which we find none in the present case. This rule emanates from the premise that the trial judge, having the benefit of audio-visual advantage, having seen first-hand the accounts provided by the witnesses, is the best person to deal with findings of facts. The Federal court case of *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd and Anor* [2010] 9 CLJ 785 is cited in support of this principle.

[49] In the circumstances and for the reasons stated above, we are of the view that the decision of the trial judge was correct. Accordingly, we therefore dismissed this appeal and affirmed the decision of the learned trial judge.

Conclusion

[50] In respect of appeal W-02(W)-2145-11-2016, we unanimously dismiss the plaintiff's appeal and affirm the decision of the learned trial judge.

[51] In respect of appeal W-02(W)-1977-10-2016, the second defendant's appeal is allowed and the decision of the learned trial judge allowing the plaintiff's claim against the second defendant is set aside. 50% of the judgment sum ordered to be paid by the second defendant *via* order dated 28 February 2017 is refunded to the second defendant with interest as accrued.

[52] As to costs, costs of RM80,000 is awarded to the second defendant (here and below). The first defendant is awarded costs of RM40,000. Both costs being subject to the payment of allocator fees. We also order that deposits be refunded to respective appellants.

Order accordingly.